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No. 82-661

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD LEE HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Speedy Trial Act, 18 U.S.C. (Supp. V) 3161(c)(2), prohibits commencement of trial within 30 days of the return of a superseding indictment when a defense preparation period of 30 days subsequent to an earlier indictment has already been allowed and the superseding indictment contains no new charges.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-681

EDWARD LEE HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 676 F.2d 1165.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25-26) was entered on April 29, 1982, and a petition for rehearing was denied (Pet. App. 27-28) on July 21, 1982. On September 8, 1982, Justice Stevens extended the time for filing of a petition for a writ of certiorari to and including October 19, 1982, and the petition was filed that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted of extortionate collection practices (Counts 1 and 4), in violation of 18 U.S.C. 894, and use of a firearm in commission of a felony (Counts 3 and 6), in violation of 18 U.S.C. 924(c). He was sentenced to consecutive terms of 20 years' imprisonment on each of the extortion counts and 10 years' imprisonment on each of the firearm counts, for a total sentence of 60 years. The court of appeals affirmed.

1. Briefly summarized, the evidence at trial showed that petitioner frequently supplied heroin to Curtis Hardy and James Conkrite. Hardy and Conkrite sometimes paid for the heroin with bad checks, and in July 1979 they owed petitioner between $700 and $800. Early on July 6, 1979, petitioner, aided by his brother Bragster, forced the two men into his basement at gunpoint, demanded payment of $3,000, and instructed Hardy and Conkrite to sign a statement confessing their indebtedness. When they did not comply, he screamed at them and abused them verbally, beat them with a blackjack, and ordered the men to shoot each other. Petitioner also placed a gun at Conkrite's head and pulled the trigger, but the gun failed to fire. Thereafter he shot each man in the left leg (Trial Tr. 54-62, 66-73, 75-91, 187-210).

Through cross-examination of Hardy and Conkrite, petitioner attempted to show that he had shot them because of a dispute about a washing machine (Trial Tr. 122, 227, 244-245).

2. On appeal, petitioner alleged that he was tried *sooner* than is permitted by Title I of the Speedy Trial Act, 18 U.S.C. (& Supp. V) 3161 *et seq.* Petitioner was originally charged in 10 counts of a 15-count indictment returned on September 24, 1980. Thereafter petitioner moved to dismiss

the indictment on the ground that the charges were not sufficiently detailed.[1] While the motion was under advisement, the government provided petitioner with the grand jury testimony of the two victims, which disclosed that petitioner shot the victims while attempting to collect past heroin debts (11-14-80 Tr. 11, 40; 11-21-80 Tr. 28, 36-37).

Subsequently, on November 18, 1980, a superseding indictment was returned by the grand jury. The total number of counts was reduced from 15 to six, and the number of counts charging petitioner from 10 to four. Although the extortion counts were more detailed than the counts in the original indictment,[2] they contained no

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[1]The original indictment identified the victims by their initials. In a Bill of Particulars filed on November 10, 1980, the government gave petitioner the full names of the victims. The victims were available to be interviewed by defense counsel at any time.

[2]For instance, Count One in the original indictment charged:

> On or about the 6th day of July, 1979, in the Central District of Illinois,
>
> EDWARD LEE HORTON,
>
> knowingly, willfully and unlawfully did participate in the use of extortionate means to attempt to collect an extension of credit from an individual, whose initials are "C.H.H." and to punish that individual for the nonrepayment thereof, in that EDWARD LEE HORTON expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of the individual and did further use violence and other criminal means in causing harm to the person of that individual in that EDWARD LEE HORTON shot the individual in the left leg with a firearm.
>
> All in violation of Title 18, United States Code, Section 894.

Count One of the superseding indictment charged:

> *COUNT 1*
>
> On or about the 6th day of July, 1979, in the Central District of Illinois, at 2128 East Monroe, Springfield, Illinois,

information that had not already been provided petitioner (11-21-80 Tr. 16, 27-30, 36-38, 44). On November 21, 1980, the original indictment was dismissed on motion of the government, and trial upon the superseding indictment was scheduled to commence on November 24.[3] Citing Section 3161(c)(2) of the Speedy Trial Act,[4] petitioner sought a continuance, arguing that he was entitled to a new 30-day defense-preparation period following return of the superseding indictment (compare note 3, *supra*). The district court denied the motion on the ground that the superseding indictment contained no new charges and that petitioner

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EDWARD LEE HORTON,

having on previous occasions, the exact dates unknown, extended credit to Curtis H. Hardy arising from the sale of narcotics, did knowingly, willfully and unlawfully participate in the use of extortionate means to attempt to collect from Curtis H. Hardy said extension of credit, the amount of which was in dispute, and to punish Curtis H. Hardy for the nonrepayment thereof, in that EDWARD LEE HORTON expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person, reputation and property of Curtis H. Hardy and did further use violence and other criminal means in causing harm to the person of Curtis H. Hardy in that EDWARD LEE HORTON shot Curtis H. Hardy in the left leg with a firearm.

All in violation of Title 18, United States Code, Section 894.

[3]The government had advised the court that trial should not be commenced earlier, so as to make sure that 30 days of pretrial preparation time were allowed to the defendant, as required by 18 U.S.C. (Supp. V) 3161(c)(2). The government reckoned the 30-day period from the date of the original indictment, but noting that it was arguable that the 30-day period was enlarged by a period when petitioner was out of the district receiving medical treatment, suggested November 24 as a safe date for trial.

[4]18 U.S.C. (Supp. V) 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

had adequate time to prepare for trial and would not be prejudiced by proceeding on the scheduled trial date (11-21-80 Tr. 16, 27-30, 44). Petitioner was tried on November 24, 61 days after the return of the original indictment, and was convicted on all four counts.

A divided court of appeals affirmed. Speaking for the majority, Judge Bauer noted (Pet. App. 7) that "[b]oth parties agree that the question of whether [petitioner was entitled to a new 30-day defense preparation period under Section 3161(c)(2)] turns on which party is responsible for dismissal of the original indictment, but they disagree as to which party was responsible for the dismissal in this case." The court observed that under 18 U.S.C. (Supp. V) 3161(d)(1),[5] if the original indictment is dismissed on the defendant's motion, the defendant is "entitled to another thirty day period before trial," whereas "subsection (d) does not apply if the government obtains the dismissal" (Pet. App. 7). The court of appeals noted that petitioner conceded that "technically the indictment was dismissed on the government's motion" (Pet. App. 8), and rejected his argument that because the filing of the motion to dismiss seemingly precipitated the superseding indictment the original indictment should be deemed to have been dismissed on petitioner's motion (*ibid.*):

> The mere filing of a defendant's motion to dismiss an indictment does not trigger subsection (d)(1); the right to a new thirty day time period is dependent upon a

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[5] 18 U.S.C. (Supp. V) 3161(d)(1) provides in pertinent part:

> If any indictment or information is dismissed upon motion of the defendant, * * * and thereafter * * * an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent * * * indictment, or information, as the case may be.

> favorable ruling on that motion. In this case, although [petitioner] filed his motion before the government filed a superseding indictment and moved to dismiss the original indictment, the trial judge never decided [petitioner's] motion. While we note that the trial judge indicated some preliminary doubts as to whether the original indictment was sufficient, we decline to speculate as to how the motion would have ultimately been resolved. Accordingly, the original indictment was not dismissed on the defendant's motion and, thus § 3161(d)(1) is not applicable.

In this connection the court pointed to 18 U.S.C. 3161(h)(6),[6] which provides that the period between dismissal upon government motion of an indictment and the filing of a subsequent indictment is excludable from Speedy Trial Act reckoning. The court concluded that "a fair implication of the statute is that [when dismissal occurs on government motion] * * * the time period [for trial] begins to run with the first indictment" (Pet. App. 9).

The court also held (Pet. App. 9-10) that, because petitioner suffered no prejudice from filing of the superseding

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[6] 18 U.S.C. (& Supp. V) 3161(h) provides in pertinent part:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> * * * * *
>
> (6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

indictment and commencement of trial thereafter, the district court did not err in refusing to exercise its discretion to extend the trial date.

Judge Swygert dissented (Pet. App. 16-24). He reasoned (*id.* at 20):

> The majority correctly states that the question of whether the thirty-day limit begins to run anew with reindictment turns on which party was responsible for dismissing the original indictment. The majority incorrectly concludes, however, that only a party who receives a favorable ruling on a motion to dismiss can be responsible for dismissing an indictment within the meaning of the Act.

In the circumstances of this case, including what Judge Swygert took to be the "obvious insufficien[cy]" (*id.* at 17) of the first indictment, he concluded that "the defendant's motion to dismiss is the proximate cause of the superseding indictment," and accordingly that the original indictment had been "dismissed on motion of the defendant" within the meaning of 18 U.S.C. (Supp. V) 3161(d)(1) (Pet. App. 20-21). Judge Swygert also concluded that the district court should have granted petitioner a discretionary "ends of justice" continuance of the trial date pursuant to 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv) (Pet. App. 21-24).

A petition for rehearing with a suggestion for en banc consideration was filed by petitioner. Citing the Ninth Circuit's decision in *United States* v. *Arkus*, 675 F.2d 245 (1982), which had been rendered six days before the opinion was filed in this case, petitioner argued for the first time: *first*, that a new 30-day defense preparation period was required "even if the Government obtained voluntary dismissal of a prior indictment" (Rehearing Pet. 3-5), and *second*, that the periods of delay excludable from computation of the last permissible date for trial under the Speedy

Trial Act also apply to the 30-day minimum trial preparation period and that he therefore had been tried unlawfully early, in any event.[7] Pursuant to Fed. R. App. P. 40(a), the court requested a response to the rehearing petition. In its response, the government explained that the purported conflict between Arkus and this case was essentially illusory (see pages 14-18, *infra*), that the petitioner had not preserved the argument based upon allegedly excludable delay, and that because petitioner had not been prejudiced, any error was harmless and he accordingly was not, in any event, entitled to a new trial. The petition for rehearing was denied (Pet. App. 27-28).

ARGUMENT

The court below correctly rejected petitioner's contention that he could not be tried within 30 days of the superseding indictment.[8]

1. As originally enacted, Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, established maximum time limits within which a case must be tried: it set no minimum limits. See 18 U.S.C. (& Supp. V) 3161(c). In 1979, however, Congress amended the Act to "assure[] the defendant some minimal time to prepare." S. Rep. No. 96-212, 96th Cong., 1st Sess. 32 (1979). Section 3161(c)(2), added by the 1979 Amendments, prohibits the commencement of trial "less than thirty days from the date on which the defendant *first*

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[7]Petitioner claimed that 48 days of the 61-day period from original indictment to trial were excludable on this basis. Compare page 4 note 3, *supra*.

[8]Petitioner's claim is based solely on the Speedy Trial Act. He does not allege that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment by reason of the denial of his motion to continue the trial. Accordingly, there is no reason to hold this case pending disposition of either *Morris* v. *Slappy*, cert. granted, 456 U.S. 904 (1982), or *United States* v. *Cronic*, petition for cert. pending, No. 82-660 (filed Oct. 14, 1982).

appears through counsel * * *" [emphasis supplied]. Thus, under the plain language of the amended statute, the 30-day period began for petitioner at his arraignment on September 25, 1980, and ended on October 25, 1980.

There is nothing in either the statute or its legislative history that supports petitioner's claim that a new 30-day period began to run from the date that the superseding indictment was filed. See generally, A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 69-75 (Fed. Judicial Center 1980). As the court of appeals noted (Pet. App. 7), under Section 3161(d)(1) when reindictment follows granting of a defendant's motion to dismiss, the government is allowed a new 70-day period to bring the defendant to trial and a new 30-day defense preparation period is also required. By contrast, Section 3161(d)(1) has no application when a superseding indictment is returned following voluntary dismissal of an earlier indictment by the government,[9] and no other provision of the Act provides for a new 30-day period in that situation.

Indeed, Section 3161(h)(6) strongly suggests that no such period is to be allowed. That section provides for exclusion of the period between dismissal of an indictment upon government motion and arraignment upon a subsequent indictment, in determining the 70-day period within which trial must commence. In requiring exclusion of the time between indictments, Congress plainly assumed that a single time period, beginning with arraignment upon the original indictment, governs the maximum period within which

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[9]It is clear that this omission does not result from an oversight. Section 3161(d)(1) triggers a new 30-day period upon refiling of charges following dismissal of a *complaint*, regardless of which party is responsible for dismissal, whereas a new 30-day period is triggered by filing of charges after dismissal of an indictment only when the dismissal is "upon motion of the defendant."

trial must be commenced. And the courts of appeals that have considered the issue have agreed that reindictment after a voluntary dismissal does not trigger a new 70-day period for trial. See *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980); see also *United States* v. *Budzyna*, 666 F.2d 666, 670 (1st Cir. 1981). The same rule should apply to the 30-day minimum defense preparation period. Unless the 30-day period and the 70-day maximum period for trial begin to run concurrently a timely trial will be impossible where a superseding indictment is returned more than 41 days after filing of the original indictment, for by the time the 30-day period is allowed to accrue the 70-day period may have elapsed (see page 17, *infra*). The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States has recognized this in its *Guidelines to the Administration of the Speedy Trial Act of 1974*, at 14 (1979 revision, with Aug. 1981 amendments):

> In the opinion of the Committee, the [defense-preparation] period does not begin to run anew when superseding indictments are filed in circumstances in which the seventy-day time limit is determined by reference to the original indictment or information. See Section 3161(h)(6). Nor does a new thirty-day minimum period begin to run if prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea. In all of these situations, the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case.

2. Renewing the only contention timely raised in the court of appeals, petitioner claims (Pet. 12-20) that the filing of the superseding indictment was prompted by his motion to dismiss, that the original indictment was legally insufficient, and that accordingly, under an appropriately

"flexible" interpretation of Section 3161(d)(1), a new 30-day trial preparation period running from the date of reindictment should be allowed. Petitioner's argument is contrary to the plain language of Section 3161(d)(1), which refers only to dismissals "upon motion of the defendant." The distinction between a dismissal upon defense motion and one on government motion is a familiar one, and there is no reason to assume that Congress meant to create a novel and different distinction when it used the term dismissal "upon motion of the defendant" in the Speedy Trial Act.

Moreover, if the petitioner's contention is accepted, the district courts and courts of appeals would have to determine the sufficiency of indictments upon which no trial is to be had. Further, it would be extremely difficult for the courts to determine what prompted the filing of a superseding indictment. In cases where a motion to dismiss has been filed, the prosecutor's motivations in filing a superseding indictment are often mixed. He may recognize the possibility that the motion has merit. He may feel that the motion will be granted, though the dismissal would be reversed upon appeal. He may wish simply to avoid unnecessary litigation, even though the indictment is believed to be entirely sufficient. Any attempt to sort out these motivations so as to determine whether the government's dismissal should be deemed to be "upon motion of the defendant" would impose substantial burdens upon the courts. It might also discourage filing of superseding indictments and encourage litigation about the sufficiency of indictments in marginal cases.

Petitioner's reliance upon *United States* v. *Rabb*, 680 F.2d 294 (3d Cir. 1982) (Pet. 13-15) and upon legislative history said to reflect Congress' desire that the Speedy Trial Act be interpreted in a flexible manner (Pet. 12-13), is misplaced. Read in context, the legislative history quoted

by petitioner lends his arguments no support.[10] *United States* v. *Rabb, supra,* does not conflict with the decision below in any respect. The only question in *Rabb* was whether an indictment timely returned by a grand jury whose term had expired tolled the arrest-to-indictment period of the Speedy Trial Act, 18 U.S.C. 3161(b),[11] so that a superseding indictment returned later on, when the error

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[10]The quotations petitioner features are taken from a portion of the Senate Committee Report on the 1979 Speedy Trial Act Amendments rejecting the suggestions of the Department of Justice and the Judicial Conference that a general relaxation of the deadlines prescribed by the Act was needed. The Committee explained that the existing provisions for exclusion of delay had been construed by the courts in an unreasonably strict manner, and that if these provisions were given their intended scope, no general relaxation of deadlines would be needed. S. Rep. No. 96-212, *supra,* at 17-20. The Committee's comments plainly do not suggest that the defense preparation provision — which was not even mentioned in this context — should be interpreted "flexibly" so as to impose an additional *constraint* upon prosecutors and courts in scheduling trials.

We note that in addition to enacting the automatic 30-day trial preparation period, Congress in 1979 recognized that additional preparation time would be needed in some cases. Thus Congress also amended the Act to permit a discretionary "ends of justice" continuance to afford defense counsel "reasonable time necessary for effective preparation." 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv); see *United States* v. *Aviles,* 623 F.2d 1192, 1196 (7th Cir. 1980). The latter provision gives the Act flexibility, and will adequately protect a defendant who legitimately needs more time because of filing of a superseding indictment. Accordingly, there is no reason to extend the application of the automatic 30-day preparation period beyond the plain language of Section 3161(c)(2). See pages 8-9, *supra.* The court of appeals held (Pet. App. 9-10) that petitioner was not entitled to a continuance under Section 3161(h)(8)(B)(iv). Petitioner has not sought review of that fact-bound determination.

[11]18 U.S.C. 3161(b) provides in pertinent part:

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

had been discovered, was not to be deemed untimely. The Third Circuit answered the question affirmatively, concluding that absent a showing of bad faith on the part of the government or prejudice to a defendant an indictment returned by an expired grand jury tolls the 30-day limit of Section 3161(b), if followed by a valid indictment charging the same offense.[12]

Contrary to petitioner's submission (Pet. 15), moreover, the court of appeals specifically determined (Pet. App. 9-10) that his reindictment, and the commencement of trial on November 24, 1980, in no respect prejudiced his ability to prepare for trial, because the government had previously provided him with the information contained in the superseding indictment, and because no new charges were contained in the second indictment (Pet. App. 9-10). See page 3 & note 1, *supra*. Accordingly there is no merit to petitioner's contention (Pet. 16-20) that the decision of the court of appeals deprived him of an adequate opportunity to prepare for trial.[13]

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[12]Petitioner points to language in *Rabb* explaining that the pertinent statutory language was to be read with an eye to the legislative purpose and to the statutory setting (Pet. 14-15). The court was careful to explain (680 F.2d at 296), however, that the pertinent statutory language was "unclear." Here, by contrast, the meaning of the statute is clear.

[13]*United States* v. *MacDonald*, No. 80-1582 (Mar. 31, 1982), on which petitioner relies (Pet. 16-17), is wholly inapposite. In *MacDonald*, this Court held that the Sixth Amendment right to a speedy trial is not extant during the period between dismissal and reinstitution of criminal charges. The Court noted that the Army did not dismiss the military charges first lodged against MacDonald in a deliberate attempt to undermine MacDonald's right to a *speedy* trial. Slip op. 9 n.12. This comment does not aid petitioner, who does not claim that his right to a speedy trial was subverted. On the contrary, petitioner contends that he was tried too soon. Petitioner's charge (Pet. 17) that the government dismissed the original indictment and filed a superseding indictment "solely" to deny him an adequate period of preparation for trial is

3. Petitioner claims (Pet. 20-22) that the decision of the court of appeals conflicts with the decision of the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (1982), in two different respects.[14] No conflict warranting review at this time exists. In order to make clear why this is so we first set out in some detail the unusual facts of *Arkus*, as well as the decision of the court of appeals in that case.

a. In *Arkus* the original indictment of the defendant was dismissed upon motion of the government shortly before the scheduled trial date, when the government learned of the death of a key witness. Eighty-one days later the defendant was reindicted upon the same charges and was rearraigned. Because only six days of nonexcludable time were left in the 70-day trial period fixed by Section 3161(c)(1) when the first indictment was dismissed, the district court was told that the case required especially prompt scheduling for trial. See 18 U.S.C. 3161(h)(6) (see pages 9-10, *supra*). In addition the prosecutor informed the court that under Section 3161(c)(2) Arkus could not be *compelled* to go to trial sooner than 30 days after the date of the second arraignment. Because the defendant declined to waive his "right" to a new 30-day trial preparation period, but also declined to waive his right to be tried within 70 nonexcludable days of the original arraignment, the district court fixed a trial date 36 days after the date of the second arraignment. In effect the district court treated the new 30-day preparation period as tolling the running of the remaining six days of the 70-day period within which Arkus had to be brought to trial. 675 F.2d at 246-247.

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without support in the record or elsewhere. This claim is also inconsistent with petitioner's theory that the original indictment was dismissed because his motion to dismiss it was meritorious.

[14]The arguments pressed by petitioner in this connection are those first raised below upon petition for rehearing. See pages 7-8, *supra*.

Twenty days before the scheduled trial date — in the midst of the trial preparation period allowed him by the district court — Arkus moved to dismiss the indictment, claiming he had not been brought to trial *soon enough* because 70 nonexcludable days had elapsed. The district court denied that motion. Arkus' trial commenced 36 days after the second arraignment. 675 F.2d at 247.

On defendant's appeal from his conviction, the court of appeals affirmed. Adopting the government's argument on appeal,[15] the court of appeals concluded that under Section 3161(c)(2) the defendant was entitled to a new 30-day trial preparation period, and that it was accordingly proper to try him at the end of that period, notwithstanding the expiration of the 70 nonexcludable days allowed the government to bring him to trial. 675 F.2d at 248.

The court concluded, however, that contrary to the district court's reckoning, the 30-day period was not to be treated as a toll and thus that the "district court erred * * * in adding the six days left after the original indictment" to the 30-day period. Instead the district court should have treated those periods as running concurrently, and commenced trial upon the expiration of the 30-day period. 675 F.2d at 248. Even though Arkus' trial did not commence until six days after that period, the court of appeals concluded that Arkus' trial was not untimely, reasoning that the 30-day trial preparation period had been enlarged by the exclusion of the 20 days during which Arkus' motion to dismiss was pending (*ibid.*).

b. The reasoning of *Arkus*, while inconsistent in one respect with the decision below, does not create a conflict warranting review at this time. To be sure, even though the

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[15]Appellee's Br. at 6-8 & n.5, *United States* v. *Arkus*, No. 81-1191 (9th Cir.).

original indictment was dismissed on the government's motion, the Ninth Circuit indicated that the defendant was entitled to a new 30-day period running from arraignment upon the second indictment. 675 F.2d at 248. That view, which we believe to be incorrect, was urged upon the court by the United States Attorney. The defendant Arkus never took the position that he was not entitled to a new trial preparation period, or that such a period could not toll or extend the 70-day period allowed for trial. Accordingly, the court of appeals' analysis was not illuminated by adversary presentations. See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The views of the *Arkus* panel thus do not create a conflict that warrants review by this Court.[16]

c. For the reasons already outlined (see pages 8-10, *supra*) the Ninth Circuit's analysis in *Arkus* is unsound.[17] The only support the Ninth Circuit adduced for its decision is legislative history which indicates generally that the

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[16]In support of its analysis the *Arkus* court stressed the possibility that a "considerable" period of time may elapse between a dismissal of an indictment and filing of a subsequent indictment. 675 F.2d at 248. Here, of course, there was no such gap; the superseding indictment was filed before dismissal of the initial indictment. Where there is no gap there is no possibility that any of the momentum of defense preparation will be lost, while the defense is lulled into thinking that the prosecution has been abandoned. Thus, even if, contrary to our submission, 18 U.S.C. (Supp. V) 3161(c)(2) may in some circumstances be applicable to a renewed indictment, it can have no application upon the facts of this case.

[17]As the certiorari petition indicates (Pet. 11), the government's response to the rehearing petition in the court below reflected the concession, made after consultation with this Office, that the position argued to the Ninth Circuit by the government in *Arkus* was legally unsound. The response also explains that the result in *Arkus* was correct for reasons other than those stated by the *Arkus* panel. No petition for rehearing or petition for a writ of certiorari was filed in *Arkus*.

purpose of Section 3161(c)(2) is to assure adequate time for trial preparation to defendants. The court did not consider whether other provisions of the Act such as 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv) (see page 12 note 10, *supra*) were adequate to meet the statutory objective in those cases where reindictment makes additional defense preparation time necessary.

Further, the approach adopted by the Ninth Circuit renders the Speedy Trial Act unworkable. Where, as in *Arkus*, an initial indictment is dismissed on government motion after the 40th day for trial thereunder, the balance of the 70-day trial period expires before the new 30-day defense preparation period is over (see page 10, *supra*). That result can be avoided, of course, if, as the district court assumed in *Arkus*, the new defense preparation period is excludable from computation of the 70-day trial period. But no authority exists in the statute for this result. Nor is there any statutory basis whatsoever for the Ninth Circuit's alternative view, that trial may be held after the 70-day period, at the end of the 30-day period.[18]

d. Petitioner also claims (Pet. 21-22) that the decision of the court below conflicts with the *Arkus* court's view (675 F.2d at 248 n.4; see page 15, *supra*) that delays that are excludable from the government's 70-day period in which to bring a defendant to trial also enlarge the defendant's minimum preparation period. No such conflict exists.

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[18]The Ninth Circuit's reconstruction of the Act is doubly unworkable because the necessary effect is that only one day, the 30th day after reindictment, is a permissible trial date.

The court below did not address this question, because petitioner did not argue in that court or in the district court that even if reckoned from the date of the original arraignment the necessary 30-day period had not been allowed. This question was first raised in the petition for rehearing (see pages 7-8, *supra*). Since the opinion intimates no view on this issue, no conflict requiring resolution exists.[19]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

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[19]Petitioner correctly observes (Pet. 22 n.10) that the Fourth Circuit has recently held that the 30-day period should be calculated without reference to excludable delay. See *United States* v. *Wooten*, 688 F.2d 941, 949-951 (4th Cir. 1982). Accord: Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635, 642-653 (1981); *Guidelines to the Administration of the Speedy Trial Act of 1974*, *supra*, at 12. For the reasons well-stated by the Fourth Circuit, which fully took account of the legislative history upon which the Ninth Circuit and petitioner rely, we believe that *Wooten* was correctly decided. Although the issue may at some time warrant review in this Court, since the issue was not timely raised or decided below, this case does not afford a suitable occasion for such review.